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No. 20

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

WMCA, INC., R. PETER STRAUS, JOSEPH DE MAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. M[illegible]CAFFERTY,

Appellants,

v.

CAROLINE K. SIMON, Secretary of State of the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; PAUL R. SCREVANE, President of the City Council of the City of New York; EUGENE H. NICKERSON, Chairman, Board of Supervisors, Nassau County; LEONARD BERMAN, Chairman, Board of Supervisors, Westchester County; ARTHUR CROMARTY, Chairman, Board of Supervisors, Suffolk County; DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF EUGENE H. NICKERSON, CHAIRMAN, BOARD OF SUPERVISORS, NASSAU COUNTY, APPELLEE, IN SUPPORT OF APPELLANTS

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BRIEF OF EUGENE H. NICKERSON, CHAIRMAN, BOARD OF SUPERVISORS, NASSAU COUNTY, APPELLEE, IN SUPPORT OF APPELLANTS

Opinions Below

The opinion of the three-judge district court dismissing the complaint (R. 294-323) is reported at 208 F. Supp. 368. It is from the judgment entered following this opinion that this appeal is taken (R. 325-327).

The earlier opinion of Judge Levet of the District Court for the Southern District of New York on convening a three-judge district court is reported at 196 F. Supp. 758. The original opinion of the three-judge district court (Waterman, Circuit Judge of the Second Circuit, Ryan and Levet, District Judges of the District Court for the

Southern District of New York), dismissing the complaint (R. 87-113), is reported at 202 F. Supp. 741. The opinion of this Court vacating the judgment of dismissal and remanding the case for reconsideration in the light of *Baker* v. *Carr*, 369 U. S. 186, is reported at 370 U. S. 190. On remand, as noted above, the complaint was again dismissed (R. 294-323), leading to this appeal.

Jurisdiction

On August 17, 1962, there was entered a judgment dismissing on the merits (R. 324-325) the complaint challenging state constitutional and statutory provisions alleged to be in violation of the Fourteenth Amendment to the Constitution of the United States. A notice of appeal to this Court was filed in the district court on August 29, 1962 (R. 325-327); probable jurisdiction was noted on June 10, 1963 (R. 328), 374 U. S. 802.

Provisions of United States Constitution, Federal Statutes and State Constitution and Statutes Involved

Section 1 of the Fourteenth Amendment to the United States Constitution; Sections 1983 and 1988 of Title 42 of the United States Code; Sections 1343(3), 2201 and 2202 of Title 28 of the United States Code; Sections 1 to 5 of Article III of the Constitution of the State of New York; and Sections 120 to 124 of New York State Law are set forth in Appendix A to the Brief for Appellants.

Question Presented

Whether the New York constitutional and statutory provisions prescribing the method of apportionment deny to residents of Nassau County their rights to equal protection of the laws or due process of law under the United States Constitution.

Statement

A. Position of Appellee, Eugene H. Nickerson.

This is a class action brought by persons who are taxpayers and voters in the State of New York (including a resident of Nassau County (R. 2)) against state officials having duties in connection with the apportionment of representatives and their election to the state legislature (Complaint, ¶¶ 3-5, R. 2-4) to have declared unconstitutional the New York State constitutional and statutory provisions governing apportionment (R. 11) and to obtain other appropriate equitable relief (R. 11-12).

At the time the action was commenced A. Holly Patterson, the then County Executive and Chairman of the Board of Supervisors of Nassau County, was one of the defendants (Complaint, ¶ 5, R. 3); he opposed granting relief to plaintiffs (R. 90). Mr. Eugene H. Nickerson, a resident of Nassau County, supported the plaintiffs' position as *amicus curiae* (R. 89).

In November, 1961, Mr. Nickerson was elected County Executive and Chairman of the Board of Supervisors of Nassau County. He was substituted as a party appellee by this Court in the prior appeal (370 U. S. 190; R. 115) and a brief in support of appellant's claim was filed on his behalf. See Brief of Eugene H. Nickerson, *WMCA v. Simon*, October Term, 1961, No. 836. Mr. Nickerson then answered the complaint by admitting error and affirmatively requesting that "the Court grant to the plaintiffs . . . the relief prayed for . . ." (R. 116-117). At the hearing in the court below, following this Court's vacation of the prior judgment of dismissal (370 U. S. 190), Mr. Nickerson personally (R. 203-204) and by counsel (R. 126, R. 149) supported the position of plaintiffs on behalf of residents of Nassau County (R. 203-204).

Mr. Nickerson's position in the case is required, as will be shown below, by the fact that the method of appor-

tionment in New York discriminates against residents of Nassau County in a way so strikingly invidious as to constitute an unconstitutional denial of their voting rights.

Appellee, Eugene H. Nickerson, adopts and supports appellants' brief as well as the brief of Paul R. Screvane, *et al.*, appellees, in support of appellants.

B. Basis for Decision Below.

Neither the opinion of District Judge Levet (R. 295-319) in which District Judge Ryan (R. 320-322) and Circuit Judge Waterman (R. 323) concurred, nor the concurring opinion, mentions the impact on Nassau County residents of malapportionment in New York State.[1] The opinion of Judge Levet points out, however (R. 313)—as does Judge Ryan's opinion (R. 321)—that the six counties in which plaintiffs reside (including Nassau) "contain 56.2% of the citizen population of the State, but . . . comprise only 3.1% of the area of the state." Five "tests" for finding "invidious discrimination" are set out in Judge Levet's opinion and discussed as the basis for the court's conclusion that such discrimination has not been shown:

> "(1) Rationality of state policy and whether or not the system is arbitrary.

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[1] The statistics relied upon by the court—1960 census figures compared with the former reapportionment based upon the 1950 census rather than the forthcoming reapportionment (R. 297)—indicate that New York City has roughly the same proportion of the total number of New York State senators and assemblymen as its population bears to the population of the state as a whole. The inappropriateness of this analysis in light of New York City's declining population is discussed in the Brief of Paul R. Screvane, *et al.*, Appellees, in support of appellants at pages 13-14. References throughout brief are to exhibits in the record even where not admitted in evidence. The source of the record material is the United States Bureau of Census, *U. S. Census of Population*: 1960 and *U. S. Census of Housing*: 1960, and is subject to judicial notice. See footnote 10, *infra*.

(2) Whether or not the present complexion of the legislature has a historical basis.

(3) Whether there lies within the electorate of the State of New York any possible remedy (if gross inequalities exist).

(4) Geography, including accessibility of legislative representatives to their electors.

(5) Whether the Court is called upon to invalidate solemnly enacted State Constitutions and laws (R. 304-305)."

The concurring opinion of District Judge Ryan relies upon the proposition that, "if apportionment were based solely on population, this would mean that 3% of the state's area would dominate the rest of New York"; that urban representatives are unlikely to understand "the problems" of rural areas; and that one disadvantage of increasing "the area per representative" by eliminating rural over-representation could be that "Representatives might not adequately represent localities which were not their home" (R. 322). He also noted that New York State provided a political remedy for malapportionment since every twenty years the people are asked if they wished to have a convention to revise the constitution and in 1957 a majority of voters answered "No" (R. 322).

Introduction and Summary of Argument

The impact of malapportionment on the suburban community of Nassau and Suffolk Counties typifies a national problem. By education, income, managerial and professional responsibility, interest in the arts, sciences and government and other appropriate criteria of status in a democracy, the residents of Nassau, as a group, have not been shown to be less worthy than residents of other areas of the state. See Table 1, pages 16-17, *infra*. Yet they are deprived of their political rights and the ability to exer-

cise any fair proportion of influence on the legislative and political processes of the state.

This deprivation occurs because suburban residents have been caught in the coils of a 19th century scheme designed by rural interests to prevent city-dwellers from achieving ascendancy. Both rural areas and central cities are declining in relative and even absolute population while the population of suburban areas is increasing in both respects. Yet the plan embodied in the 1894 Constitution of New York operates with remorseless irrationality to deprive 1963 suburban dwellers of their constitutional right to participate equally in our representative form of government.

Whether or not constitutional when first adopted, New York's apportionment provisions have, through the passage of time, become unconstitutional by depriving a large number of the state's voters of their right to vote and thereby of their right to equal protection of the laws. In this respect the failure of the apportionment formula to take appropriate account of population shifts has created much the same kind of problem as did Tennessee's failure to reapportion after 1901 which was before this Court in *Baker* v. *Carr*, 369 U. S. 186.

By state constitutional mandate both houses of the legislature are malapportioned in New York. The value of the vote of residents in relatively sparsely populated counties is multiplied by reducing the voting power of residents in more densely populated counties. In the Senate this discrimination is accomplished by computing the number of seats to be allocated to counties with more than 6% of the population in a way different from that used for other parts of the state. In the Assembly the same result is reached by limiting the number of seats and allocating an excessive proportion of them, one to each county no matter what its population.

As a result of this discriminatory scheme, the ratio between the least and most populous senate district,

Suffolk, is 3.9 to 1, and between the least and most populous assembly district, in Nassau, is 21 to 1. After reapportionment based upon the 1960 census, the least populous senate district will have 2.6 the voting power of the most populous in Nassau; the least populous assembly district will have 11 times the voting power of one of the districts in Suffolk. Voting districts—outside of Nassau County—containing approximately 37% of the state's population will elect a majority of the Assembly, and districts containing approximately 38% will elect a majority of the Senate.

Deliberate discrimination results in Nassau County residents being denied representation in the legislature. Their right to vote—the most prized possession of a citizen in a democracy—is arbitrarily reduced in value. The effect of this deprivation of voting power is equivalent to refusing to count the ballots of hundreds of thousands of voters from this county.

As a practical matter, denial of representation in the legislature results in withholding from Nassau County communities the kind of laws and financial assistance they badly need. In this and similar suburban areas, swift growth and demands for the highest forms of education and other municipal services have created problems that can only be solved by the state legislature or—in a way inimical to our federal system—by ignoring the states and concentrating power in the federal government. Representatives from the rural counties have neither the interest in, nor the understanding of, suburban problems that representatives from the suburbs themselves have.

Our democratic system has reached a stage of maturity at which there is a consensus of constitutional and political theory and a public assumption that each person's vote is to be given the same weight as every other person's, insofar as it is practicable to do so. The concept of "one man, one vote" has been the dominant standard of the legislative apportionment cases since *Baker* v. *Carr*, 369 U. S. 186.

Gray v. *Sanders*, 372 U. S. 368, the most recent expression of this Court on the matter, has explicitly adopted the concept of "one person—one vote" in elections for a statewide officer. There is no basis in principle for distinguishing votes for a legislature. The legislature itself is a single body, acting with statewide officials to adopt laws which govern the state as a whole. Adequate representation in the legislature is at least as important to the voter as the right to select a particular incumbent for most statewide offices. Any loss of representation must be reflected not only in a loss of influence in the legislature but throughout the government structure, for under our system of checks and balances the executive must constantly take into account legislative reaction to his program.

The constitutional standard of voting power proportionate to population is clear and easily enforceable. Nevertheless, it permits the states wide discretion in devising variant systems to comply with it. Equal voting power implies the same standard for both houses of the legislature.

Even if this Court does not explicitly adopt the principle of voting rights proportionate to population for both houses, New York's scheme results in representation so disproportionate to population and so discriminatory as to constitute invidious discrimination as a matter of law. Each house of the legislature departs from minimum constitutional standards.

No reason for the violation of the constitutional rights of appellants has been offered that bears any relevance to ability to vote or the need for representation. Discrimination is not based on considerations of convenience of communication of representatives with their constituents or upon any other rational geographic factor. It is based purely on an intent to discriminate against heavily populated areas.

Due process of law requires that legislation be based on rational assumptions about the facts justifying the law. The only hypothesis that could justify the discrimination involved in New York's scheme of apportionment is that rural voters are superior as citizens to suburban and urban voters. But the evidence on this score indicates that the hypothesis is contrary to the facts.

The existence of a possible political remedy through a vote for a constitutional convention in 1977 does not provide adequate relief for a current violation of the personal constitutional right to vote. Even assuming that a fairly selected constitutional convention could provide a remedy, a New York convention would necessarily be ineffective, since representatives to the New York convention must be selected from malapportioned districts.

There is no reason to expect that New York will seek to circumvent its responsibility to provide a constitutionally valid method of apportionment, should the present scheme be declared unconstitutional. No foreseeable difficulties in formulating a remedy warrant denial of equitable relief to appellants.

I. There is gross and invidious discrimination against residents of Nassau County in apportioning each House of the Legislature.

A. Mechanics of Discrimination.[2]

Apportionment of the legislature every ten years on the basis of the most recent federal census is required by the

[2] See the Brief of Paul R. Screvane, *et al.*, Appellees, In Support of Appellants at pages 17-39 for a complete explanation of the system. See also Silva, *Apportionment in New York [Senate]*, 30 Fordham L. Rev. 581, 595 *et seq.* (1962); Silva, *Apportionment of the New York Assembly*, 30 Fordham L. Rev. 1 (1962); Silva, *Apportionment of the New York State Legislature*, 55 The American Political Science Review 870 (1961). The description used in this brief is based on Wells, *Legislative Representation in New York State*, 15-19 (1962).

New York State Constitution. See New York Constitution, Article III, Section 4, paragraph 1; Section 5, paragraph 1. The last apportionment took place in 1953 (New York Laws of 1953, Chapter 893), and a new apportionment must be adopted within the next few years. See New York Constitution, Article III, Section 4. If, however, the New York constitutional provisions setting forth the method of apportionment are not declared unconstitutional, then the legislature will be forced to discriminate against Nassau County residents, just as it has been forced to in the past.

The operation of the New York constitutional formula for apportionment (New York Constitution, Article III, Sections 2-5) can be illustrated by assuming that all of the 1960 population resided in the six most heavily populated counties of the state except for one citizen residing in each of the remaining counties.[3] In such case, the formula would result in a Senate consisting of 75 members, each of the six populated counties having 8 senators. 16,240,000 persons would be represented by 48 senators and 56 persons would elect 27 senators. In the assembly the six populated counties would be entitled to 95 assemblymen and the 56 people residing outside these counties would be entitle to 55 assemblymen.

The situation under the prospective New York reapportionment will, in some respects, be worse than that in the hypothetical case since the relatively sparsely populated counties will control the legislature. Voting districts containing approximately 37% of the state's population will elect a majority of the Assembly, and approximately 38% a majority of the Senate.

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[3] It is predicted that while the "central city" of New York will decline in population, the inner ring of surrounding counties such as Nassau will grow greatly for the next thirty years and an outer ring of counties such as Suffolk will grow even faster. Vernon, *Metropolis 1985, An Interpretation of the Findings of the New York Metropolitan Region Study*, 220-222 (1960).

In the Senate, seats are apportioned by first dividing the state's citizen-population by fifty. The result is called "the first ratio". All counties with citizen-populations at least three times this number—that is, at least 6% of the state's citizen-population—are assigned seats by comparing their citizen-populations to the first ratio. These counties are referred to as "the first-ratio counties". Counties with citizen-populations between three and four times the ratio receive three seats; those with citizen-populations between four and five times the ratio receive four seats; those with citizen-populations between five and six times the ratio receive five seats, and so on.

Next, the number of Senate seats given each first-ratio county is compared to the number it had in 1894. For this purpose the present counties are reconstructed as they were in 1894 when, for example, Queens and Nassau were one. If any of these counties is found to be entitled to more seats than it had in 1894, the total Senate membership is increased by the same number of additional seats. Thus, if a county with six seats in 1894 were given ten under a new apportionment, it would cause Senate membership to increase by four over the basic fifty.

After this process is completed, the remaining seats in the Senate are divided among the counties which have less than 6% of the citizen-population. To apportion these seats, a "second ratio" is used—obtained by dividing the combined citizen-population of all the under-6% counties by the remaining number of seats—including the newly-created ones. These seats are then distributed on the basis of the second ratio. The second ratio is not specifically established or required by the Constitution but is made necessary by its limitations and by judicial interpretation of the constitutional formula.

If this two-ratio system for the senate did not exist there would be 24 senate seats left for the second-ratio counties instead of 31. Each time a first-ratio county becomes en-

titled to a greater share of the basic 50 seats than it had in 1894, the number available for the other counties would decrease if the constitutional machinery did not create extra seats. In this way, additional seats gained by the heavily-populated counties since 1894 do not result in a corresponding reduction of seats for the smaller counties—despite the fact that the smaller counties' proportionate share of the state's citizen-population has actually decreased. Population increases by the over-6% counties actually cause the under-6% counties to become more over-represented. Indeed, the complex Senate apportionment formula produces the following rather startling result: the relative power of voters in the over-6% counties decreases as those counties' proportionate share of the state population increases, while the relative power of voters in the under-6% counties increases as those counties' proportionate share of the state population decreases.

The constitutional formula for Assembly apportionment is less intricate than the one for the Senate but it is even more effective in producing rural over-representation. The number of Assembly seats is set at 150, distributed among the counties as follows:

1) First, every county is given one seat, except Hamilton and Fulton Counties which share one seat.

2) Next, every county which has at least 1% of the state's citizen-population is given an additional seat.

3) Finally, all the remaining seats are divided among those counties which have at least 1⅓% of the state's citizen-population in accordance with their relative population.

The effect of this process is to separate the counties into groups on the basis of population. Inequity results from the fact that because so many assembly seats are distributed on the first step, not enough remain to provide the heavily-populated counties with a proportionate share.

B. The Statistics of Discrimination.

Nassau and Suffolk, two of the nation's most swiftly growing suburban counties, dramatically illustrate the irrationality, arbitrariness and invidious discrimination required by New York's scheme of apportionment.

The six assemblymen elected from Nassau represent an average population of 212,634 (R. 227);[4] the most populous assembly district in the state is Nassau's Fourth District with a population of 314,721. Suffolk's three assemblymen now represent an average population of 216,704 (R. 227), while the statewide average per district is only 108,272—and this average includes both under and over-represented districts. The ratio between the most populous and the least populous district—Nassau's Fourth and Schuyler County (whose population is 14,974)(R. 229)—is 21 to 1; the ratio between the average Nassau district and the least populous district is 15 to 1.

The discrepancy between population and voting power is endemic to the system. The aggregate population of the thirty-one least populous counties is the state is 1,289,129 (R. 227-229, R. 238) which is approximately the same as Nassau's total population of 1,275,801 (R. 227). Yet Nassau is represented by six assemblymen while the thirty-one least populated counties are represented by thirty assemblymen (R. 227-229).

In the Senate, although the state-wide average population represented by each senator is only 280,014, Suffolk County's one senator represents a population of 650,112 (R. 227), while Nassau's three senators each represent an average of 425,267 (R. 227). The ratio between the most populous senate district, Suffolk, and the least popu-

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[4] All population figures are those used in New York apportionment and they are given as of the 1960 census unless otherwise noted. See footnote 1, *supra*. They exclude alien residents. As in the case of almost all counties outside of New York City, over 98% of Nassau's residents are citizens (R. 291).

lous, comprising Saratoga, Warren and Essex counties, with a total population of 166,715 (R. 228), is 3.9 to 1. The ratio between the average Nassau County senatorial district and this least populous senatorial district is 2.6 to 1.

Reapportionment based upon the 1960 census will continue to leave Nassau County grossly under-represented in the Senate. Nassau County's three senatorial districts will each have an average population of 425,267 (R. 234). The least populous district based upon the 1960 census—which will probably comprise Putnam and Rockland Counties[5]—will have a population of 162,840 (R. 227-228); the ratio is 2.6 to 1.[5]

It is instructive to notice that despite the fact that Nassau's population increased from 655,690 in 1950 to 1,275,801 in 1960 (R. 227)—an increase which almost doubled it—Nassau County will not obtain a single additional senator upon reapportionment (compare R. 227 with R. 234). This anomaly results from the fact that previously Nassau had less than 6% of the population of the state while now it has more than 6% of the state's population, and counties falling into the latter category are specifically discriminated against by the apportionment scheme.

Among the other absurd results of any forthcoming reapportionment as mandated by New York's Constitution will be that Monroe County—a favored county because it does not have more than 6% of the state's population—will have the same number of senators as Nassau

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[5] The legislature has some discretion in drawing senatorial district lines for multi-county districts (R. 285). See New York Constitution, Article III, Section 4. In order to comply with the rule requiring districts of equivalent population, the legislature is likely to combine Putnam in a district with Rockland. But even if the Essex-Saratoga-Warren district is recreated as the one with the smallest population, it will have a total of 166,715, leaving the ratio of 2.6 to 1 unchanged (R. 273). See also the testimony at R. 178. In no event will the ratio be less than 2.5 to 1.

(R. 237), although its population of 571,029 (R. 234) is less than half Nassau's. Onondaga County, with a population of 414,770 (R. 227), will have two senators (R. 237) although each of Nassau's three senate districts will have a larger population than that county. Voters in counties with approximately 38% of the population will elect a majority of senators (R. 227-229, R. 237).

In the Assembly, Schuyler County, under apportionment based on the 1960 census, will continue as the least populous district with 14,974 (R. 238), while Nassau's ten districts will average 127,580 (R. 237)—a ratio of almost 9 to 1. Suffolk will probably have one assembly district of 171,000,[6] a ratio of 11 to 1 compared to the least populous assembly district (R. 237-240). After the reapportionment Nassau's population will have 10 assemblymen while the 31 least populated counties with a total population almost the same as Nassau's will continue to be represented by 30 (R. 238-239). Counties with approximately 37% of the state's population will send a majority of assemblymen to the legislature (R. 285).

Although some of the proponents of New York's scheme of malapportionment sought to justify it on the ground that the residents of favored counties were superior,[7] and

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[6] The record at R. 237 and R. 240 shows a Suffolk district with a population of 216,704 after reapportionment. However, because of the rules against dividing towns (New York Constitution, Article III, Sections 4 and 5), the largest assembly district in Suffolk will probably cover the same area as the First Senatorial District including Brookhaven, Easthampton, Southold, Southampton, Shelter Island, Riverhead and adjacent and enclosed communities, with a total population of over 170,000. In any event, one projected Monroe County District will have a population of 190,343 (R. 240) and the ratio of that County is 13 to 1.

[7] See, *e.g.*, Delegate to the New York 1894 convention, Cookingham, who noted in support of discrimination: "the average citizen in the rural district is superior in intelligence, superior in morality, superior in self-government, to the average citizen in the great cities." 4 Revised Record of the Constitutional Convention of 1894 of the State of New York, 10-11 (1900). See also Appendix C, Appellants' Brief, pages 131-139.

this reason is still sometimes openly stated, there is not the slightest support for it in fact.[8] The discrepancy between voting power of Nassau residents and their position as taxpayers and citizens is illustrated by the table set out below:

TABLE I

Comparison of Nassau and Upstate Counties with Respect to Voting Power, Education, Occupation, and Economic Status (1960).[9]

VOTING POWER RATIO

Value of the vote of residents of counties shown as compared to the vote of Nassau residents computed on the basis of 1960-citizen population per representative.

	Based upon Present Apportionment		*Based upon Prospective Apportionment*	
	Assembly	Senate	Assembly	Senate
Nassau (average district)	1	1	1	1
Essex	6.1	2.6	3.7	2.6
Warren	4.9	2.6	2.9	2.6
Saratoga	2.4	2.6	1.5	2.6
Schuyler	14.3	2.1	8.6	2.1

[8] Assemblyman Paul Reed Taylor of Yates County, *Civic Virtue Lives in the Country*, Monitor, May 1962, pp. 7, 20, declared: "In contrast to the countryman's stability there is plenty of evidence that the city dweller has limitations on his self-governing ability." See some of the contrary evidence in Appellants' Brief at footnote 37.

[9] Voting power data is based on record at R. 227-229 and R. 237-240. Public School expenditures from the University of the State of New York, *Fifty-Seventh Annual Statistical Report of the Education Department 1960-61, part II, Advance Statistics for the 1960-61 School Year*, Table 23, figures based on average of figures given per school district within counties. All other data from U. S. Bureau of the Census, *U. S. Census of Housing: 1960* and *U. S. Census of Population: 1960*. For an example of the extensive community interest in the arts see a description of the 1963 Nassau County Arts Festival in N. Y. Times, September 4, 1963, page 33, column 1.

The prospective apportionment in the Senate is based upon the assumptions in footnote 5, *supra*. In no event will the ratio be less than 2.5 to 1.

EDUCATION

	% Having Completed Some College		Median Schooling in Years		Average Public School Expenditures Per Weighted Pupil	Tax Levy Per Resident Weighted Pupil
	1-3 yrs.	4 yrs.	Male	Female		
Nassau	9.4	7.8	12.3	12.1	$639.20	$486.10
Essex	4.6	3.2	9.6	10.9	602.57	292.21
Warren	5.4	4.6	10.7	11.4	603.91	304.36
Saratoga	4.2	3.9	10.3	11.0	490.91	201.36
Schuyler	3.6	3.1	10.3	11.2	413.50	115.50
N. Y. State	4.8	5.4	10.6	10.7	520.00	344.00

OCCUPATION BY PERCENTAGE OF TOTAL WORK FORCE

	Professional	Manager	Clerical	Sales	Farm	Skilled Labor	Unskilled Labor
Nassau	16.7	14.7	16.9	10.6	0.3	14.4	2.6
Essex	12.2	8.3	10.2	5.6	3.1	14.2	6.6
Warren	12.5	10.7	12.9	8.3	0.5	12.5	5.5
Saratoga	12.4	6.6	13.4	5.9	2.3	15.5	4.6
Schuyler	9.8	6.3	10.9	6.3	11.3	16.8	6.1
N. Y. State (male only)	12.2	11.8	9.8	7.7	1.4	18.2	5.3

ECONOMIC STATUS

	Median Income—1959			*Homes Owned*		*Residence Rented*	
	Family	Male	Female	Median Value	Estimated Total Value (Median value x number of homes owned)	Median Mo. Rental	Estimated Total Mo. Rental (Median rental x number of of rentals)
Nassau	$8,529	$6,513	$1,755	$18,500	$ 5,220,000,000	106	$ 5,890,000
Essex	5,259	3,514	1,098	7,600	39,391,000	60	168,000
Warren	6,335	3,984	1,365	9,800	73,250,000	73	295,000
Saratoga	5,822	4,216	1,374	10,300	136,372,000	65	477,100
Schuyler	5,098	4,032	1,115	8,200	16,700,000	66	60,190
N. Y. State	6,371	4,619	1,940	15,300	39,050,000,000	74	214,400,000

C. The Results of Discrimination.

The denial of the right to vote through serious malapportionment constitutes, we submit, a denial of due process and equal protection of the laws. What is being denied is one of the most cherished possessions of citizens, a right to participate in government as a voter, which is, in the long run, fundamental to all other civil rights. Voting equality has a spiritual and emotional value to individuals that is incalculable.

Equal voting rights also have value on a less lofty plane. Voting power is denied to citizens in order to gain economic and social, as well as political advantage for those whose voting power is multiplied. Indeed, unless we are to assume that the right to vote has no more than sentimental value in our country, the proposition is axiomatic that the denial of a right to vote constitutes a significant loss.

The ways in which the distortion of voting power have been reflected in government policy are clear. Some details are set forth with respect to the City of New York in the affidavit of R. Peter Straus (R. 250).[10] Moreover, the allegations in the complaint that, as a result of malapportionment, the legislature discriminated against segments of the population by unjust taxation and unfair distribution of funds (R. 9) must, for the purposes of this appeal, be taken as true, since plaintiff was denied the right

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[10] While proof of the matter contained in this affidavit was denied admission in evidence (R. 133-134, R. 145-147) over objection of Appellee, Eugene H. Nickerson (R. 149, R. 132-133), the details are in the main subject to judicial notice, involving as they do matters of public record and common knowledge. See, *e.g.*, *Boynton* v. *Virginia*, 364 U. S. 454, 461-463 (1960); *Brown* v. *Board of Education*, 347 U. S. 483, 489-490, 493.

to prove the contention. *Clark* v. *Uebersee Finanz-Korp., A. G.*, 332 U. S. 480, 482; *Gibson* v. *United States*, 329 U. S. 338, 341.

In Nassau and similar suburban communities, swift growth and demands for education and other municipal services have created great fiscal pressures and need for legislation that can only be solved in state legislatures.[11]

Under-representation means that the interests of Nassau residents and others similarly situated will be inadequately protected in the legislature. Nassau residents have been forced to shoulder exceedingly heavy local tax burdens.[12] For example, state aid to education is predicated upon state-wide averages of cost per student. If circumstances compel a local school district—as Nassau community school districts are compelled—to spend more than the state average, "this added cost is borne entirely by the local district." See The University of the State of New York (Paul A. Hedlund), *State Aid to New York School Districts Paid During the School Year 1961-62 Including Four-Year Transient School Finance*, 2 (Dec. 1962). See also State of New York, Joint Legislative Committee on School Financing, *New Formula Proposal and Staff Studies*, 68 (Leg. Doc. No. 10 (1962)). Adequate representation of urban and suburban groups might well have made possible greater local aid. Examples of fiscal discrimination resulting from inadequate representation were offered in evidence but rejected (R. 250-268, excluded at R. 145-147).

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[11] See Vernon, *Metropolis 1985, An Interpretation of the Findings of the New York Metropolitan Region Study*, 178 (1960). "Nassau's communities helped to bridge the difference between expenditure and revenue by the growing use of state aid." *Id.* at 179.

[12] *Ibid.*

II. New York's apportionment system violates the rights of Nassau residents to due process and equal protection of the laws.

A. The minimum constitutional standard for a method of state legislative apportionment is that it provide, as nearly as may be practicable, that each person's vote be the equal of any other person's vote.

The right to equal representation is at the heart of our constitutional system. Insistent concern with the issue begins, in this country, with the nation's birth.[13] One of the complaints "submitted to a candid world" in our Declaration of Independence was the King's attempt to force the colonists to "relinquish the right of representation in the Legislature, a right inestimable to them and formidable to tyrants only." The Declaration's premise "that all men are created equal" requires the conclusion reached by Jefferson "that a government is republican in proportion as every member composing it has his equal voice in the direction of its concerns . . . by representatives chosen by himself . . ." Letter to Samuel Kercheval, 12 *The Works of Thomas Jefferson* 3, 4 (Ford ed. 1905). "Equality of condition is the fundamental fact from which all others seem to be derived." De Tocqueville, *Democracy in America*, 1 (Bradley ed. 1946). Deviations there have been from the

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[13] Prior to the 1894 convention, representation in both the New York Senate and Assembly was predicated on an approximation of equal representation for equal population. See 3 Lincoln, *Constitutional History of New York*, 127, 144, 159-160, 182, 189 (1906). See also Appellants' Brief, Appendix B, pages 125-130; Silva, *Apportionment in New York*, 30 Fordham L. Rev. 581, 597-603, 31 *Id.* 1, 2-13 (1962). The equalitarian voting principle "ingrained in the national character" (Hacker, *Congressional Districting*, 5 (1963)) was, in New York and other states, sacrificed at the turn of the century to retain political supremacy of rural interests. See Brief *Amicus Curiae* of the American Civil Liberties Union, The American Jewish Congress, and the National Association for the Advancement of Colored People, Point IV, B, History.

ideal, and property and other qualifications on the right to vote have persisted, but few in recent years have doubted that the essence of our system was equality of all citizens in the exercise of political rights—a principle now often summarized in the phrase "one man, one vote."

The principle has been eloquently stated in a case which presaged *Baker* v. *Carr*:

> "Ours is a representative form of government. It can remain such in the true sense only if the vote of each citizen has equality with that of his neighbor in the other counties of the State. . . . To the extent that his county is given a lesser number of members in the lower House than are its due, his vote diminishes in value and thus he does not receive the full measure of protection and representation which are the essence of democracy. No man can boast of a higher privilege than the right granted to the citizens of our State and Nation of equal suffrage and thereby to equal representation in the making of the laws of the land. . . . In our view, such deprivation [of equal representation] not only offends against the *State Constitution* but may very well deny equal protection of the laws in violation of the *Fourteenth Amendment* of the *United States Constitution.*"
>
> *Asbury Park Press* v. *Woolley*, 33 N. J. 1, 11, 161 A. 2d 705, 710 (1960). (Emphasis in original.)

In this country, we have now reached a consensus on the right of each voter not to have the value of his vote diminished by the state. This agreement is at least as broad and firm as was that on the effects of segregation relied upon in *Brown* v. *Board of Education*, 347 U. S. 483, 494, n. 11. The conference of scholars assembled in 1962 by the Twentieth Century Fund agreed that population is "the only legitimate basis of representation today." The Twentieth Century Fund (Lewis), *One Man—One*

Vote, 1 (1962). They pointed out that "The cry of 'one man, one vote' heard today in the emerging new lands of Asia and Africa is no more than a reflection of democratic philosophy learned from the West." *Id.* at 5. See also Mair, *Safeguards for Democracy*, 3 (1961). As the United States Advisory Commission on Intergovernmental Relations put the matter: "considerations of political equity demand . . . that the apportionment of both houses in the state legislature . . . be based strictly on population." U. S. Advisory Commission on Intergovernmental Relations, *Apportionment of State Legislatures*, 67 (Dec. 1962). (Original in italics.)

Even those who have expressed doubt about the wisdom of *Baker* v. *Carr*, 369 U. S. 186 (1962), concede that the concept of equality of voting power represents "a latent consensus" of Americans that this is the "presumptive democratic standard." McCloskey, *The Supreme Court 1961 Term—Forward*, 76 Harv. L. Rev. 54, 59 (1962); *cf.* Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057, 1086 (1958); Note, *Baker* v. *Carr and Legislative Apportionments: A Problem of Standards*, 72 Yale L. J. 968, 983 (1963).

The sole testimony in the record on the issue of accepted political theory is that of Professor Ruth C. Silva, an expert in this field (R. 154-155). While she was not allowed to testify with respect to the issue on direct, on cross-examination she testified as follows:

> "Q. . . . Have you used the term 'equitable representation' or 'equal representation'?
>
> [fol. 405] A. Yes, sir, I have.
>
> Q. Would you tell us exactly what you mean by those terms? A. That one man equals one vote, that a popular vote cast for a State Senator in any one county has equal weight with one popular vote cast in any other county.

Q. There are other theories of equal representation known to the science of political science, well recognized ones? A. Not that I know of. Historically there have been other theories. But I do not believe political science accepts other theories."

. . . . .

"A. I had assumed, and I think my profession generally assumes, that the ideal is one man, one vote; that this is a basic premise of democracy.

[fol. 407] Q. You assume that that is a basic premise of democracy A. I know the literature, the apportionment literature assumes this." (R. 164-166)

"One-man, one-vote" has been a dominant theme in the legislative apportionment cases decided since *Baker* v. *Carr*, 369 U. S. 186 (1962). See, *e.g.*, *Sanders* v. *Gray*, 203 F. Supp. 158 (N. D. Ga. 1962), *modified*, 371 U. S. 368 (1963); *Sincock* v. *Duffy*, 215 F. Supp. 169 (D. Del. 1963); *Mann* v. *Davis*, 213 F. Supp. 577, 584 (E. D. Va. 1962); *Scholle* v. *Secretary of State*, 367 Mich. 176, 116 N. W. 2d 350 (1962). This formula is emphatically asserted to be a fundamental precept of democracy. "Equality in such matters lies at the basis of our free government." *Scholle* v. *Secretary of State*, 367 Mich. at 187, 116 N. W. 2d at 354. Looking at this Court's decision in *Baker*, one court has pointed to the

> "strong implication . . . that there must be some reasonable relationship of population, or eligible voters, to representation in the General Assembly, if an apportionment is to escape the label of constitutionally-prohibited invidious discrimination."
>
> *Maryland Committee for Fair Representation* v. *Tawes*, 228 Md. 412, 434, 180 A. 2d 656, 668 (1962). See also *Scholle* v. *Secretary of State*, 367 Mich. 176, 185-186, 116 N. W. 2d 350, 353-354 (1962). *Cf. Sims* v. *Frink*, 208 F. Supp. 431, 435-436 (M. D. Ala. 1962).

There are numerous indications in the developing federal constitutional law pointing squarely to the conclusion that equal voting rights are an element of equal protection of the law. The Fifteenth Amendment prohibiting discrimination in voting rights based on race, color, or previous condition of servitude and the Nineteenth prohibiting sex as a basis for abridging the right to vote suggest that discrimination of the kind at issue in this case is not permissible. The majority opinion in *Baker* v. *Carr*, 369 U. S. 186, summarized some of the earlier development (369 U. S. at 208):

> "A citizen's right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, cf. *United States* v. *Classic*, 313 U. S. 299; or by a refusal to count votes from arbitrarily selected precincts, cf. *United States* v. *Mosley*, 238 U. S. 383, or by a stuffing of the ballot box, cf. *Ex parte Siebold*, 100 U.S. 371; *United States* v. *Saylor*, 332 U. S. 385."

Classic, *Mosley* and *Saylor*, suggest the conclusion that a voter would be deprived of both equal protection of the law and due process if the legislature declared that his vote could not be counted or that it could only count for a fraction. Is this not the same result achieved by providing that one vote upstate is worth many times a vote in Nassau County?

Gomillion v. *Lightfoot*, 364 U. S. 339, pushed forward the line of decisions recognizing constitutional limitations even on such matters of intimate state concern as municipal boundaries, when the purpose or "inevitable effect" (364 U. S. at 342) of a change was to discriminate in voting rights on the ground of race. For, the unanimous court noted (364 U. S. at 347),

"When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. . . ."

Baker v. *Carr*, 369 U. S. 186, made it clear that there were constitutional standards limiting dilution of voting power by the states. Finally, in *Gray* v. *Sanders*, 372 U. S. 368, an explicit and workable test was set out. "How," this Court asked, ". . . can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in . . . the smallest rural county?" (372 U. S. at 379). This Court's answer was that there was no constitutional way to discriminate against voters (372 U. S. at 379-380, 381):

"Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and whatever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions."

. . . .

". . . But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded. . . . The conception of political equality from the Declaration of Independence, to Lincoln's

> Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote. . . . . "

Justices Clark and Stewart, concurring, also adopted the principle of "one voter, one vote." *Id.* at 382.

Gray, to be sure, involved votes within a single constituency—the state—for a single statewide officer. But there is no basis in principle for distinguishing votes for a legislature. The legislature itself is a single body. Members of the legislature act jointly with the governor in enacting laws which govern the state as a whole. Adequate representation in the legislature is as important to the citizen-voter as the nature of the men who hold statewide offices; in many instances the statewide office is relatively unimportant compared to the legislature.[14]

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[14] Among the many kinds of state-wide elective offices which are far less important than the legislature are the following: *Alabama:* Commissioner of Agriculture and Industry, President of Public Service Commission; *Arizona:* Superintendent of Public Instruction, State Mine Inspector, Corporation Commissioner; *Arkansas:* Commissioner of State Lands; *California:* Members of State Board of Equalization; *Colorado:* Regents of the University of Colorado; *Delaware:* Insurance Commissioner; *Florida:* Commissioners of Railroad and Public Utilities Commission, Commissioner of Agriculture; *Georgia:* Public Service Commissioners; *Idaho:* Mines Inspector; *Illinois:* Clerk of the Supreme Court; *Indiana:* Reporters of Supreme Court and Appellate Courts; *Iowa:* Secretary of Agriculture, Commerce Commissioner; *Kansas:* Commissioner of Insurance, State Printer; *Kentucky:* Commissioner of Agriculture, Labor, and Statistics, Clerk of Court of Appeals; *Louisiana:* Board of Education members, Public Service Commissioner, Custodian of Voting Machines, Commissioner of Agriculture and Immigration, Register of State Land Office; *Michigan:* State Highway Commissioner, Members of Board of Governors of Wayne State University, Board of Agriculture members, Board of Education members, Regents of University of Michigan; *Minnesota:* Railroad and Warehouse Commissioner, members of Railroad

(Footnote continued on following page)

The principle of *Gray* v. *Sanders* that all votes must be given equal weight in electing state-wide officials, has direct relevance for the analogous case of legislative apportionment. See *Sincock* v. *Duffy*, 215 F. Supp. 169 (D. Del. 1963). To illustrate this analogy, imagine a state in which all state legislators were elected at large, throughout the state and where the vote of a resident of a rural county was then so weighted that it was equivalent to the votes of ten residents of an urban county. The result, according to *Gray* v. *Sanders*, obviously would be unconstitutional. But is the result any different if the rural county is given five extra representatives to elect, and the urban county is alloted only one-half of its proportional share of representatives? The consequence, in either case, is that the voter in the rural county has ten times the political power of the urban voter. This is the "invidious discrimination" that the post-*Baker* cases condemn.

(Footnote continued from preceding page)

and Warehouse Commission; *Mississippi:* Commissioner of Insurance, Land Commissioner, Highway Commissioner, Public Service Commissioner; *Montana:* Railroad and Public Service Commissioner, members of Railway and Public Service Commission; *Nebraska:* members of Railway Commission, University Board of Regents members, State Board of Education members, Railway Commissioner; *Nevada:* State Printer, Mine Inspector, members of Board of Regents of State University; *New Mexico:* Commissioner of Public Lands, Corporation Commissioner; *North Carolina:* Commissioner of Insurance, Commissioner of Agriculture; *North Dakota:* Commissioner of Insurance, Commissioner of Agriculture and Labor, Public Service Commissioner; *Oklahoma:* State Examiner and Inspector, Chief Mine Inspector, Commissioner of Charities and Corrections, Commissioner of Insurance, Corporation Commissioner, Clerk of Supreme Court and Court of Criminal Appeals; *Pennsylvania:* Secretary of Internal Affairs; *South Carolina:* Adjutant and Inspector General, Commissioner of Agriculture; *South Dakota:* Commissioner of School and Public Lands, Public Utilities Commissioner, members of Public Utilities Commission; *Tennessee:* Public Service Commission members; *Texas:* Commissioner of the General Land Office, Railroad Commission members, Commissioner of Agriculture, Railroad Commissioner; *Washington:* Commissioner of Public Lands, Insurance Commissioner; *West Virginia:* Commissioner of Agriculture. Source: Council of State Governments, *Book of the States* (1958-1963).

What is involved here is not a "difference of political *initiative* as between . . . thinly populated counties and those having concentrated masses," *Mac Dougall* v. *Green*, 335 U. S. 281, 284 (emphasis supplied), but a deliberate shifting of the state's lawmaking functions to representatives of a minority of the state. Remarkably, not the slightest evidence has been offered to show that this minority is more capable than the majority of acting in the state's best interests.

It represents a complete misconception of the way our lawmaking system operates to suggest that those voters who are seriously under-represented in the legislature are, nevertheless, not denied any significant voice in the government because they can look to the Governor for representation since he is elected on the basis of equality of voting power.[15] Our system of checks and balances compels the executive to adjust his program on any issue to meet the demands of the legislature. Thus any substantial loss of representation in the legislature is reflected in a loss of influence in the total governmental structure. It is voting power which represents—however indirect its effects may be—the final sanction of the public.

Any difference in the treatment of statewide officers and a legislature is explicable not on the ground of principle but on the basis of practical difficulty. It is much easier for the court to insure that votes for a single officer be counted with absolute equality than it is for it to do this in the case of a statewide body elected by districts. But such practical

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[15] This is the essence of the suggestion made with respect to New York in the Note, *Baker* v. *Carr and Legislative Apportionments: A Problem of Standards*, 72 Yale L. J. 968, 1019-1027 (1963). It is made by denigrating the value of the right to vote in a somewhat more generalized and sophisticated way through an emphasis on the importance in our form of government of a variety of means other than the franchise for exercising influence and power. Bickel, *Reapportionment and Liberal Myths*, 35 Commentary 483 (1963); Neal, *Baker* v. *Carr: Politics in Search of Law*, 1962 The Supreme Court Review 252; *cf.* De Grazia, *Essay on Apportionment and Representative Government* (1963).

difficulties as exist do not require abandonment of the principle in the case of the legislature. Once a clear standard is enunciated, it can be expected that the states will attempt in good faith to comply. Where there are clear departures from the minimum constitutional standard, the courts can insure compliance.

Even though the Constitution fixes the standard, the states may meet it in a variety of ways. As this Court noted in *Ker* v. *California*, 374 U. S. 23, in connection with application of minimum constitutional search and seizure standards to the states under the due process clause of the Fourteenth Amendment:

> "While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental—*i.e.*, constitutional—criteria established by this Court have been respected. The States are not thereby precluded from developing workable rules. . . . Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques." 374 U. S. at 34.

Apportionment must be based upon an attempt to make each person's vote for state legislative representatives the equal, as nearly as may be practicable, of any other vote. Nevertheless, the states may utilize a broad range of discretion in devising plans to meet this standard. Among the approaches possible are the following:

1. Allocation of representatives on the basis of population or number of voters.

2. Allocation of representatives to counties or cities or to other areas for reasons of administrative convenience

or because there is a unity or ease of communication that makes them natural centers for representation.

3. Use of reasonable intervals between apportionments which may result in some temporary malapportionment due to interim shifts in population.

Voting power may continue to be limited by a disqualification that bears some relation to the supposed ability to vote intelligently, as in a reasonable and fairly administered literacy test or in rules for minimum periods of residence designed to insure orderly conduct or reduce fraud in an election. *Lassiter* v. *Northampton County Election*, 360 U. S. 45. It may not be limited by criteria having no relation in fact to ability to exercise the franchise.

Present disqualifications constitute a violation of due process as well as equal protection of the laws. To satisfy the minimum test of due process, legislation must be based upon rational assumptions about facts requiring it and must serve an acceptable social purpose. As Professor Henkin has pointed out in another context:

> "Due process of law requires that legislation have a proper public purpose . . . [and] that means be reasonably related to public ends. Legislation cannot be based on unfounded assumptions about character and its corruption."
>
> Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391, 402 (1963).

The only hypothesis that could possibly support the discrimination here is that there is a clear superiority, as citizens, of voters in counties with relatively small populations. But the evidence on this score indicates that the hypothesis is contrary to the facts. See Table I, pages 16-17 and footnotes 8 and 9, *supra*.

Our fluid society encourages changing positions and shifting alliances. A citizen may be in a minority as a Negro, but in a majority in wanting aid to public education and in a minority again in wanting more public housing.

The unconstitutional weighting of some people's voting rights so that they have greater power in all groups in which they participate, distorts the democratic system. Denying other voters their equal voting power in any group in which they wish to participate, constitutes a violation of the Fourteenth Amendment.

The conclusion that the Constitution mandates equal voting power in electing the legislature eliminates, we submit, any principled ground for allowing discrimination as to one house. The inapplicability of the federal Senate analogy has been completely demonstrated. *Gray* v. *Sanders*, 372 U. S. 368. See also McKay, *Reapportionment and the Federal Analogy* (National Municipal League, Aug. 1962); The Twentieth Century Fund (Lewis), *One Man-One Vote*, 8-11 (1962). It has been explicitly rejected in a number of reapportionment cases. See *Sincock* v. *Duffy*, 215 F. Supp. 169, 186 (D. Del. 1963); *Jackman* v. *Bodine*, 78 N. J. Super. 414, 431, 188 A. 2d 642, 651 (Super. Ct. 1963); *Sims* v. *Frink*, 208 F. Supp. 431, 438 (M. D. Ala. 1962).

The United States Senate represented a compromise between sovereign states as a condition for their forming a Union. That exception is built into the federal Constitution. Counties, by comparison, are the creatures of the state, organized and reorganized for convenience in administration. New York was not created by any compact of sovereign counties. They can be divided, if additional assembly districts are not thereby created (New York Constitution, Article III, Section 5)—as was Nassau from Queens; and the legislature is empowered to "provide by law for the organization and government of counties." New York Constitution, Article IX, Section 1(b). The very definition of a county in Section 3 of the New York County Law, indicates its nature as a convenient administrative arm of the state:

> "A county is a municipal corporation comprising the inhabitants within its boundries and formed for

> the purpose of exercising such powers and discharging such duties of local government and administration of public affairs as may be imposed or conferred upon it by law."

The state's municipal policies in organizing local government cannot be used as the justification for denying personal rights and liberties guaranteed by the Constitution. *Gomillion* v. *Lightfoot*, 364 U. S. 339.

There is no inconsistency between the constitutional principle of equal voting rights and the common practice of utilizing a bicameral legislature. Whatever advantages accrue from differences between the two houses may be provided for by varying the size of each house and its powers and rules, as well as the terms of office and qualifications of its members. Differences in each house's tradition will emphasize their individuality and assure differences in approach to the legislative process. Furthermore, the selection of representatives from districts which of necessity are far apart in outlook, tradition and needs will continue to provide "a medley of voices from minor fractions of the population." Neal, *Baker* v. *Carr, Politics in Search of Law*, 1962 Supreme Court Review 252, 277. But each minor voice will not be artificially muted by denying it the representational voting power of other voices.

The position that equality of voting power is required in each house of the legislature has explicitly been embraced in *Sincock* v. *Duffy*, 215 F. Supp. 169 (1963), where the court, having determined that the House apportionment must be based upon population, wrote:

> "A House of Representatives elected on a strict population basis and a Senate elected on a strict area basis as provided by the 1963 Amendment could give the majority of the voters a veto power but it could not assure them legislative strength to take affirmative

action on measures which might be very necessary for the general welfare of the State.

"Such affirmative action must be rendered possible and, as we have already indicated, an apportionment should not be permitted that would allow a blockage of major legislation desired by the great majority of electors of Delaware to come to pass in the Senate. Effecting the will of the majority of the people of a State must be deemed to be the foundation of any apportionment plan." 215 F. Supp. at 190.

The same principle underlies the decision of the Michigan Supreme Court in *Scholle* v. *Secretary of State,* 367 Mich. 176, 116 N. W. 2d 350 (1962), on remand from the U. S. Supreme Court. The Michigan House of Representatives was already apportioned exactly according to population. Nevertheless, the state court held that the Senate must also be apportioned to afford equal representation.

Other answers to this problem of two houses have been suggested. Even those cases, however, which have proceeded on the ground that the population standard must be strictly applied to only one house, have recognized that very substantial discrepancies in the other house are not permitted. This stand was taken in *Baker* v. *Carr* on remand, 206 F. Supp. 341. The existing apportionment for the House of Representatives recognized a "two-thirds" principle, whereby a county having only two-thirds the number of voters necessary for a representative would nevertheless be allotted a representative. The court said:

". . . we are of the opinion that if the two-thirds principle should be applied and used in apportioning seats in the House of Representatives, either by applying it to counties or floterial districts, or to both, then it would follow that the Senate would have to be apportioned on the basis alone of numbers of qualified voters. Contrariwise, if the Senate should be apportioned on an equitable and rational basis not fully related to voting strength, it would be necessary to ap-

portion the House of Representatives on the basis of numbers of qualified voters alone, without regard to the two-thirds principle whether applied to counties or districts or both." 206 F. Supp. at 349.

Similarly, in *Jackman* v. *Bodine*, 78 N. J. Super. 414, 188 A. 2d 642 (Super. Ct. 1963), some inequities in representation in the New Jersey Senate were upheld because the state Assembly was apportioned strictly on the basis of population.

Whichever position be taken with respect to the issue of bicameral legislatures, New York's present system of apportionment is indefensible. The house which comes closest to being representative of population is the Senate where the discrepancies are, and will be, more than 2½ to 1. See page 14, footnote 5, *supra*. Reapportionment here is obviously needed if population criteria are to control. In the Assembly, where all but two counties are given a minimum of one representative, the discrepancies are now as high as 21 to 1 and, under the forthcoming reapportionment they will be more than 10 to 1. See page 15, footnote 6, *supra*. This is too great a discrepancy under any test, particularly since simple combining of a relatively few counties can drastically reduce the ratios.[16] This practice is presently accepted in New York; Hamilton and Fulton Counties presently share an assemblyman and many of the counties share a senator (R. 227-229).

Far less difficulty is to be expected in enforcing a clear, consistent standard for apportionment based upon population than, for example, in applying standards to search and seizure or confession cases which arise under the due

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[16] See Brief of Paul R. Screvane, *et al.*, Appellees in Support of Appellants at pages 93-96, for an illustration of one suggestion for retaining the present size and basic structure of the New York Legislature. While this change would immensely improve the New York situation, we do not concede that it would satisfy constitutional standards for equality of voting power.

process clause. Because of the consensus in favor of this standard of equal voting power, which has already been noted, New York as well as other states can be expected to comply without court compulsion. Once the present New York Constitutional provisions are declared invalid, the New York legislature will be free to act in accordance with federal constitutional standards.

B. The New York system of apportionment necessarily leads to invidious discrimination.

Even if this Court does not adopt a standard of equality according to population—under which New York's apportionment scheme would clearly be unconstitutional—invidious discrimination by any possible standard has been shown. There is no constitutionally valid justification for the large variations in voting power between residents of more populated areas and those of less-populated areas.

Many of the recent lower court decisions have formulated the rule that any substantial disparity in representation constitutes prima facie invidious discrimination. "It has been widely accepted that proof of a very substantial disparity in representation is sufficient to establish a prima facie case of invidious discrimination." *Davis* v. *Synhorst*, 217 F. Supp. 492, 497 (S. D. Iowa 1963). See also *Sincock* v. *Duffy*, 215 F. Supp. 169 (D. Del. 1963). *Maryland Committee for Fair Representation* v. *Tawes*, 228 Md. 412, 180 A. 2d 656 (1962); *Harris* v. *Shanahan*, No. 90, 476, Dist. Ct. Shawnee County, Kansas, May 31, 1962; *Lisco* v. *McNichols*, 208 F. Supp. 471 (D. Colo. 1962); *Thigpen* v. *Meyers*, 211 F. Supp. 826 (W. D. Wash. 1962); *Toombs* v. *Fortson*, 205 F. Supp. 248 (N. D. Ga. 1962); *Sims* v. *Frink*, 208 F. Supp. 431 (M. D. Ala. 1962); *Mann* v. *Davis*, 213 F. Supp. 577 (E. D. Va. 1962).

Most of the cases do not attempt to draw the line at which invidious discrimination begins. Several cases do, however, assay a specification of the numerical dis-

parities which an apportionment may not exceed without rational justification. The line has been drawn at 2 to 1 in *Scholle* v. *Secretary of State*, 367 Mich. 176, 188, 116 N. W. 2d 350, 355 (1962); at 4 to 1 in *Sweeney* v. *Notte*, 183 A. 2d 296, 301 (R. I. 1962); and at 10 to 1 in *Moss* v. *Burkhart*, 207 F. Supp. 855, 891 (W. D. Okla. 1962).

Sincock v. *Duffy*, 215 F. Supp. 169 (D. Del. 1963), suggests a ratio of 2 to 1 as the limit of permissible inequality. Relying on a statistical study of apportionment cases, the Court asserted:

> "The standard most often used by the court is a comparison between the largest and smallest districts, according to population in relation to each other and the average or theoretically perfect district. These cases suggest that when the standard is equality of population, an apportionment plan resulting in one district containing more than double the population of another will be invalid." 215 F. Supp. at 190.

But the Court found even this ratio excessive, and required that disparities be decreased below the 1.5 to 1 ratio proposed by the plaintiffs. All of these lines of permissible disparity are crossed in New York.

C. No valid reason to depart from the standard of equal voting power in New York has been shown; no adequate excuse for the invidious discrimination against Nassau residents has been suggested.

Our submission is that no considerations other than those reflecting population with reasonable exactitude can find support in reason once the principle of equal voting rights is accepted. *Sincock* v. *Duffy*, 215 F. Supp. 169 (D. Del. 1963). See also the concurring opinion in *Scholle* v. *Secretary of State*, 367 Mich. 176, 243, 116 N. W. 2d 350, 381 (1962).

If any justification for departure from a population test is permitted, it must bear "some relevance to the purpose for which the classification is made."[17] *Walters* v. *City of St. Louis*, 347 U. S. 231, 237. See also *McGowan* v. *Maryland*, 366 U. S. 420, 425. The only justification for multiplying the voting power of rural residents is their superiority as voters. But, as has already been shown at pages 16 to 17, there is not the slightest reason to believe that residents of Nassau are inferior in this respect to residents of other areas of the state.

Neither the reasons given by the court below, nor any others which have been suggested, justify New York's discriminatory apportionment. The court below posed five "tests" for invidious discrimination: whether New York's law 1) is rational or arbitrary; 2) has an historical basis; 3) provides another remedy; 4) is based on geography; and 5) calls upon the court "to invalidate solemnly enacted State Constitutions and laws" (R. 304-305). None of these criteria has any relevance to this case.

The first and last would be inappropriate in any case. Whether the scheme is rational or arbitrary must depend on whether there is a constitutionally valid justification for it. No matter with what solemnity a state provision is adopted, if it is unconstitutional it cannot stand.

The court's second reason—history—is equally inappropriate. The fact that the discrimination was deliberate and has continued for many years is no justification for

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[17] The New Hampshire court, for example, has upheld a scheme for the State Senate in which representation is apportioned according to the amount of taxes paid by each senatorial district. In fact, such a formula closely approximates equal representation: 45.3% of the population is necessary to elect a majority of the Senate. The plan is justified as a logical conclusion of the principle "no taxation without representation." *Levitt* v. *Maynard*, 104 N. H. 243, 182 A. 2d 897 (1962).

the deprivation today of the constitutional rights of people. *Brown* v. *Board of Education*, 347 U. S. 483. "The right to vote is personal," *United States* v. *Bathgate*, 246 U. S. 220, 227, and the fact that other voters in times past acquiesced in the denial of their own rights is no basis for denying rights to a voter today. Even an apportionment scheme which at its inception was intended to provide equal representation, may now frustrate that purpose because of population shifts.

> "The result is that what may have been a reasonable apportionment by population when the system was introduced has, through inaction, become an unreasonable system as related to population. . . .
>
> "Applying these historical facts to the test of indiviousness, we are unable to discern any justification for continuing this system merely because it has a historical basis in Georgia's political institutions. This is so, primarily, because while historically the statute and constitutional requirements remain substantially the same, the passage of time and changing living habits of the people have distorted it into something entirely different from what it was at its genesis."
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> *Toombs* v. *Fortson*, 205 F. Supp. 248, 255 (N. D. Ga. 1962).

Moreover, a scheme which was originally approved by plebescite because, at the time, it afforded voters equal representation, may now be obsolete. *Davis* v. *Synhorst*, 217 F. Supp. 492 (S. D. Iowa 1963).

Availability of a political remedy through a constitutional convention—the court's fourth ground—is a doubtful reason to deny relief. *Baker* v. *Carr*, 369 U. S. 186, by failing to adopt Mr. Justice Frankfurter's dissent, in effect ruled that citizens are not limited to their political remedies.

Speaking of the right to equal representation, the court in *Moss* v. *Burkhart*, 207 F. Supp. 885 (W. D. Okla. 1962), pointed out:

> ". . . the right asserted here cannot be made to depend upon the will of the majority. It is founded in the Federal Statute, which gives redress for the deprivation of civil rights, including the integrity of the ballot." 207 F. Supp. at 894.

At best a referendum or constitutional convention is of doubtful utility. In Nebraska, where the initiative is available, the court did not feel it excused judicial action. The court held that the initiative was too costly, and too rarely successful to provide an adequate substitute for judicial relief. *League of Nebraska Municipalities* v. *Marsh*, 209 F. Supp. 189 (D. Neb. 1962).

In New York a constitutional convention in 1979—assuming it is approved by vote in 1977—is even more clearly an inappropriate remedy. All but fifteen delegates to a convention would be selected using the present malapportioned senatorial districts. New York Constitution, Article XIX, Section 2. Malapportionment would thus be permitted "to perpetuate the inequality of representation." *Davis* v. *Synhorst*, 217 F. Supp. 492, 499 (S. D. Iowa 1963).

The fact that a constitutional convention was not approved by the people in 1957 is of no significance. The reasons for that vote can not be known. See the discussion in Brief of Paul R. Screvane, *et al.*, Appellees in Support of Appellants at pages 77-90. As the Iowa District Court noted:

> "The fact that the people of Iowa have repeatedly [in 1930, 1940, 1950, and 1960] voted against a constitutional convention is persuasive, but not sufficient to establish their acceptance of the present apportionment. There is no possible way of knowing how many voters voted against the measure even though

> they regarded the present system as being unsatisfactory. . . . Quite possibly a significant number felt that a convention would be futile inasmuch as the details would be left to a malapportioned General Assembly."
>
> *Davis* v. *Synhorst*, 217 F. Supp. 492, 501 (S. D. Iowa 1963).

In the State of Washington, the initiative had been exercised just two years prior to the lawsuit to determine whether there should be a new apportionment. Although it was rejected by the voters, the court noted that the reasons behind that decision were obscure. The voters might not have liked the method of the proposed reapportionment, or might have misunderstood the choice. The court declared that they could not, thereby, be deprived of their "inalienable constitutional right of equal protection." *Thigpen* v. *Meyers*, 211 F. Supp. 826, 832 (W. D. Wash. 1962). That conclusion is particularly applicable to New York, where rejection of a convention in 1957 may merely indicate a recognition of the futility of such a convention, in which representation would be based upon the present inequitable scheme for senatorial districts.

The one remaining reason given for the decision of the court below is based upon geography. This reason would, we contend, be inadmissible in any case. The statement of principles at a conference of research scholars and political scientists pithily summarizes the matter:

> ". . . acres do not vote; nor do trees. When a sparsely settled area is given as many representatives as one much more populous, it simply means that the *people* in the sparse area have more representation. No matter how stated, it is people who choose the representatives."
>
> The Twentieth Century Fund (Lewis), *One Man—One Vote*, 5 (1962) (emphasis in original).

This factor of geography is a mere rationalization for discrimination. As the District Court for Delaware indicated:

> ". . . there is no geographical feature which prevents the residents of any County from easy access to those of another, or which obstructs face-to-face communications between the citizens and members of the General Assembly. . . . Indeed . . . [it is] clear that in respect to geographical features only extraordinary ones like the inaccessibility of the upper Michigan Peninsula to the rest of that State could justify the election of additional representatives to the lower House of a legislature and the consequent dislocation of the principle of strict representation of population therein."
>
> *Sincock* v. *Duffy*, 215 F. Supp. 169, 187 (D. Del. 1963).

The mere fact that there are economic or geographic differences between districts does not of itself justify any inequalities in representation. *Lisco* v. *McNichols*, 208 F. Supp. 471 (D. Colo. 1962). In any case, extreme discrimination between districts, of the kind that exists in New York, cannot be justified on geographic or economic grounds. *Moss* v. *Burkhart*, 207 F. Supp. 885 (W. D. Okla. 1962).

The geographic argument was, nevertheless, strongly relied upon by the court below. The opinion of District Judge Levet as well as the concurring opinion of District Judge Ryan point out that the six counties in which the plaintiffs reside contain 56.2% of the population but only 3.1% of the area of the state (R. 313, R. 321). Despite their reliance on this factor, it is clear that New York's apportionment scheme operates in a purely mechanical way based only on population per county. Area does not enter into any computation. A county's representa-

tion is determined purely on the basis of its population and not on the basis of such factors as its area or population per square mile or internal accessibility or terrain. The table below, based on 1950 population and 1953 apportionment, illustrates what a reading of the New York provisions demonstrates—that differences in area are irrelevant under New York's apportionment scheme (R. 227-229). Counties with the same low population receive the same number of representatives whether they are large in area or small in compass. Discrimination is not based upon acreage[16] or on convenience of communications within a voting district but upon a deliberate intent to favor counties with small populations.

TABLE 2

ABSENCE OF RATIONAL PLAN FOR APPLYING GEOGRAPHICAL FACTOR IN APPORTIONMENT

County	*Population*—1960 1950 population shown in parenthesis (R. 227-229)	*Area* Sq. Miles (R. 61)	*Population Per. Sq. Mile*	*Standard Metropolitan Areas* (R. 48)	*Present Apportionment* Assemblymen (R. 227-229)	Senators (R. 227-229)
Broome	209,597 (181,496)	710	295	with 100,000-250,000	2	1
Niagara	235,677 (184,161)	533	442	with 250,000 or more	2	1
Richmond	216,764 (185,032)	60	3613	with 250,000 or more	2	1
Cattaraugus) Chautauqua)	223,380 (200,154)	2415	92	None	2	1

The additional grounds—essentially geographic—given by District Judge Ryan for the decision below are equally insufficient as a basis for denying plaintiffs their constitutional rights. It is possibly true, as he pointed out, that urban representatives may not understand rural problems

[16] *Cf.* the Michigan constitution which does use area, equating voters with acres in a fixed proportion. 1963 Mich. Const., Article IV, Section 2.

(R. 322). But, of course, it is equally true that rural representatives may not comprehend urban and suburban difficulties. In any event, no one has suggested that rural voters be denied representatives in the legislature—but only that they not have their vote and power multiplied beyond their numbers. Concededly, a representative from a wine or potato growing district or a milk or garment producing area will be better able to urge the special interests of his constituents, but there is no inconsistency between this ability and the principle of equal voting rights.

Judge Ryan made the additional suggestion that "Representatives might not adequately represent localities which were not their home" (R. 322). No scheme, including the present one, can arrange matters so that representatives in a state as large as New York represent only their home community. As the court below itself pointed out, the present Fortieth Senatorial District is larger than Connecticut, and St. Lawrence County is larger than the State of Delaware (R. 313).

Finally, there is no reason in this case to avoid "the intervention of federal equity power" (R. 312) because of any supposed difficulties in providing a remedy. There is not the slightest reason to suspect that the legislature in New York will not respond promptly and adequately to a court's decree annulling the present system of planned malapportionment.[19]

Even without the benefit of a definitive statement of standards in *Baker* v. *Carr*, the lower courts have had no great difficulty in finding appropriate remedies. Given a definite standard, the legislatures and courts can quickly solve the problem of malapportionment.

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[19] Governor Rockefeller announced that he would not ask the Legislature to act on reapportionment until after this Court had ruled. N. Y. Times, June 11, 1962, page 26, columns 1-2.

CONCLUSION

For the foregoing reasons, the judgment of the Court below should be reversed and the case remanded with a direction to grant the relief sought in complaint.

Respectfully submitted,

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